

Faridah Begum bte Abdullah v Dato' Michael Chong

HIGH COURT (KUANTAN) — CIVIL SUIT NO 22-30 OF 1994
ARIFIN ZAKARIA J
17 MARCH 1995

Civil Procedure — Security — Security for defendant's costs — Whether security automatic where plaintiff is bankrupt and not ordinarily resident in Malaysia — Whether court precluded from ordering security for costs by s 8(1) of the Bankruptcy Act 1967 — Whether lack of assets within jurisdiction and ease of enforcement of judgment relevant factors — Discretion of court — Bankruptcy Act 1967 s 8(1) — Rules of the High Court 1980 O 23 r 1(1)

The defendant applied under O 23 of the Rules of the High Court 1980 ('the RHC') for an order for security for costs to be furnished by the plaintiff on the main grounds that the plaintiff, a Singaporean, was ordinarily resident out of jurisdiction, had failed to state her permanent address, was a bankrupt and did not have sufficient assets within jurisdiction. The plaintiff raised a preliminary objection that an order for security for costs would amount to a debt provable under s 8(1) of the Bankruptcy Act 1967 ('the Act') and, as such, would fall foul of the RHC as the Official Assignee, being an aggrieved party, was not joined as a party. The plaintiff also claimed that she had property in Malaysia and was a director of two local companies and that as Singapore was listed in the Reciprocal Enforcement of Judgments Act 1958, any judgment could be enforced with ease.

Held, ordering the plaintiff to pay RM15,000 into court as security for costs:

- (1) The mere bankruptcy or impecuniosity of a plaintiff is not a sufficient ground for ordering security for costs against it. On the other hand, the court is not precluded from ordering security for costs under O 23 of the RHC merely by reason of the plaintiff's bankruptcy or impecuniosity. Therefore, the court may order security for costs if, having regard to all the circumstances of the case, the court finds it just to do so.
- (2) In this case, the plaintiff's land was subject to several encumbrances, including an alleged sale, and the two companies were inactive and had no substantial assets. Although ease of enforcement is a factor to be considered, enforcement of judgments in Singapore is not automatic and the mere fact that the plaintiff is resident in Singapore is not a ground for refusing to order security for costs. Furthermore, the plaintiff's failure to disclose her Singapore address weighed against her.
- (3) The court has to avoid any attempt at a detailed investigation into the merits of the case. This should only be done in plain and obvious cases, unlike the present case, where the issues involved were complex and the final outcome far from clear.

A [Bahasa Malaysia summary]

Defendan telah memohon di bawah A 23 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') bagi suatu perintah supaya jaminan kos diberikan oleh plaintif atas alasan utama bahawa plaintif, seorang warganegara Singapura, biasanya bermastautin di luar bidang kuasa, gagal menyatakan alamatnya yang kekal, adalah bankrap dan tidak mempunyai aset yang cukup di dalam bidang kuasa. Plaintif membangkitkan bantahan permulaan bahawa suatu perintah untuk jaminan kos akan merupakan suatu hutang yang boleh dibuktikan di bawah s 8(1) Akta Kebankrapan 1967 ('Akta itu') dan, oleh itu, akan melanggar KMT kerana Pegawai Pemegang Harta, sebagai suatu pihak terkilan, tidak dicantumkan sebagai suatu pihak. Plaintif juga menyatakan bahawa beliau mempunyai harta tanah di Malaysia dan adalah pengarah dua buah syarikat tempatan dan bahawa memandangkan Singapura adalah disenaraikan dalam Akta Penguatkuasa Salingan Hukuman 1958, sesuatu penghakiman boleh dikuatkuasakan dengan agak senang.

Diputuskan, memerintahkan plaintif membayar RM15,000 ke dalam mahkamah sebagai jaminan kos:

(1) Kebankrapan atau kemiskinan seseorang plaintif tidak merupakan alasan yang mencukupi untuk memerintahkan jaminan kos terhadapnya. Sebaliknya pula, mahkamah tidak dihalang daripada memerintahkan jaminan kos di bawah A 23 KMT semata-matanya kerana kebankrapan atau kemiskinan plaintif. Oleh itu, mahkamah boleh membuat perintah untuk jaminan kos sekiranya, setelah mengambil kira seluruh keadaan sekeliling kes itu, mahkamah berpendapat ia adalah adil untuk berbuat demikian.

(2) Di dalam kes ini, tanah plaintif tertakluk kepada beberapa bebanan, termasuk suatu jualan yang dikatakan, dan dua buah syarikat itu adalah tidak aktif dan tidak mempunyai banyak aset. Walaupun kesenangan penguatkuasaan adalah suatu faktor yang perlu diambil kira, penguatkuasaan sesuatu penghakiman di Singapura bukanlah secara automatik dan hakikat semata-mata bahawa plaintif bermastautin di Singapura bukan suatu alasan untuk tidak membenarkan perintah untuk jaminan kos. Lagipun, kegagalan plaintif untuk mendedahkan alamat beliau di Singapura memberi kesan buruk terhadapnya.

(3) Mahkamah mesti mengelak daripada sebarang percubaan untuk membuat penyiasatan yang teliti ke dalam merit sesuatu kes. Ini hanya seharusnya dilakukan dalam kes yang nyata dan jelas keputusannya, tidak seperti kes ini, di mana isu-isu yang terlibat adalah kompleks dan keputusan akhirnya adalah tidak jelas.

Notes

For cases on security in civil cases, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2959–2962.

Cases referred to

Amar Hoseen Mohammed Revai v Singapore Airlines Ltd [1995] 1 SLR 77 (not folld)

Coldham v Raub Australian Gold Mining Co Ltd [1940] MLJ 50 (not folld)

Cook v Whellock (1890) 24 QBD 658 (refd)

Kasturi Palm Products v Palmex Industries Sdn Bhd [1986] 2 MLJ 310 (folld)

Ng Hui Lip & Anor v Chan Hwa Cheng & Ors [1958] MLJ 57 (folld)

Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074; [1987] 1 WLR 420 (folld)

Rhodes v Dawson (1886) 16 QBD 548 (refd)

Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] QB 609; [1973] 2 All ER 273; [1973] 2 WLR 632 (folld)

Thune & Anor v London Properties Ltd & Ors [1990] 1 All ER 972; [1990] 1 WLR 562 (folld)

Legislation referred to

Bankruptcy Act 1967 s 8(1)

Reciprocal Enforcement of Judgments Act 1958

Rules of the High Court 1980 O 23 r 1(1) & (2)

Karpal Singh (Karpal Singh & Co) for the plaintiff.

Bastion Vendargon (Vendargon & Partners) for the defendant.

Arifin Zakaria J: This is an application by the defendant under O 23 of the Rules of the High Court 1980 ('the RHC') for security for costs to be furnished by the plaintiff. The defendant filed a total of four affidavits in support of his application (encls 6A, 18A, 26A and 29A). The plaintiff filed three affidavits in reply (encls 15A, 21A and 27A). The plaintiff is a citizen of the Republic of Singapore having no permanent resident status in Malaysia. The plaintiff has been a regular visitor to Malaysia since 1990. During the pendency of this application, the plaintiff had been adjudged bankrupt pursuant to bankruptcy petition No 29-69-1994 in the High Court of Malaya at Kuantan.

Preliminary objection

When this matter came up for hearing on 14 January 1995, Mr Jagdeep Singh, counsel for the plaintiff, raised a preliminary objection with regard to this application. He stated that since the plaintiff had been adjudged bankrupt, this may give rise to a problem of compliance because of s 8(1) of the Bankruptcy Act 1967 ('the Act'). He contended that an order for security for costs would amount to a debt provable under s 8(1) of the Act, thus the Official Assignee would be an aggrieved party. This application would fall foul of the RHC since one of the aggrieved parties, ie the Official Assignee, had not been joined as a party. In reply, Mr Vendargon on behalf of the defendant, countered that s 8(1) of the Act relates to a debt provable in bankruptcy whereas security for costs in a pending suit is not a debt provable, it is not such, at least not until at the end of the day.

- A He further maintained that on the authorities of *Rhodes v Dawson* (1886) 16 QBD 548 and *Cook v Whellock* (1890) 24 QBD 658, the mere act of bankruptcy or impecuniosity is not a ground for security for costs to be ordered against a party and therefore, he said, by necessary implication, security for costs may still be ordered in a fit and proper case. He also
- B contended that to say that an order for security for costs could not be made against a bankrupt would in effect put a bankrupt in a more privileged position than a non-bankrupt. That, he said, could not be right.

- For reasons that will follow, I agree entirely with the submissions of the learned counsel for the defendant. The authorities merely indicate that bankruptcy or impecuniosity should not by itself be a ground for ordering
- C security for costs, they do not say that in those circumstances an order for security for costs could not be made. Since there is nothing either in the Act or in the RHC which takes away the discretion of the court under O 23 to order security for costs in a fit and proper case, I take it that O 23 applies to a bankrupt in the same way as it applies to other litigants. But
- D as established by several authorities, bankruptcy should not be a factor that should prompt the court in making such an order. For those reasons, I hold that the court is not precluded, by reason of the plaintiff's bankruptcy, from ordering the plaintiff to furnish security for costs if, in all the circumstances of the case, the court finds it just so to do. I, therefore, dismissed the plaintiff's preliminary objection.

- E *The application proper*

Security for costs is governed by O 23 r 1(1) of the RHC which provides as follows:

- F (1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court —
- (a) that the plaintiff is ordinarily resident out of the jurisdiction; or
- ...
- (c) subject to para (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or
- G ...
- then, if, having regard to all the circumstances of the case, the court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.
- (2) The court shall not require a plaintiff to give security by reason only of para 1(c) if he satisfies the court that the failure to state his address or the mis-statement thereof was made innocently and without intention
- H to deceive.

The legal position with regard to security for costs is clearly stated in para 23/1–3/2 of 1 *Supreme Court Practice 1993* which reads:

- I Rule 1(1) provides that the court may order security for costs 'if, having regard to all the circumstances of the case, the court thinks it just to do so'. These words have the effect of conferring upon the court a real discretion, and indeed the court is bound, by virtue thereof, to consider the circumstances of each case, and in the light thereof to determine whether and to what extent or for what amount a plaintiff (or the defendant as the case may be) may be ordered to provide security for costs. It is no longer for

example, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs.

And a little down the same page, it says:

Security cannot now be ordered as of course from a foreign plaintiff, but only if the court thinks it just to order such security in the circumstances of the case.

This statement of the law was approved and adopted by Mohamed Dzaiddin J (as he then was) in *Kasturi Palm Products v Palmex Industries Sdn Bhd* [1986] 2 MLJ 310. Some indication of the relevant circumstances to be considered may be drawn from what was said by Lord Denning MR in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609 at p 626; [1973] 2 All ER 273 at pp 285–286; [1973] 2 WLR 632 at p 646 wherein he said:

The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Counsel for Triplan helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that too would count. The court might also consider whether the application for security was being used oppressively — so as to try to stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct of the defendants, such as delay in payment or delay in doing their part of the work.

The defendant is relying on six main grounds in support of his application, namely:

- (a) the plaintiff is ordinarily resident out of the jurisdiction;
- (b) the plaintiff failed to state her permanent address in Malaysia or in Singapore;
- (c) defendant has a strong prima facie defence to the plaintiff's claim;
- (d) the plaintiff has no sufficient assets within the jurisdiction;
- (e) the plaintiff has no genuine case; and
- (f) the plaintiff is a bankrupt.

It is not in dispute that the plaintiff is a resident of Singapore and her only asset within the jurisdiction is a piece of property known as Lot No 1384 Kampung Baru Beserah. This property was, at the date of hearing of this application, subjected to the following encumbrances:

- (a) lien-holder's caveat dated 19 August 1993 lodged by Balakrishnan a/l V Sinnayah;
- (b) kaveat persendirian [private caveat] lodged by Gan Kuan Leng, Elvin (Yan Guan Long, Elvin) registered on 22 March 1994; and
- (c) perintah larangan [prohibitory order] issued by the Sessions Court Kuantan dated 4 August 1994.

A Further, according to a 'surat akuan' allegedly executed by the plaintiff dated 11 March 1994, the plaintiff admitted receiving the sum of RM300,000 from Gan Kuan Leng as a consideration for the sale of the said property. The plaintiff did not make any denial of these allegations as advanced by the defendant.

B Apart from the said property, the plaintiff also claims to be a director of two local companies. But the defendant in his affidavit (encl 18A) claims that these two companies do not have any substantial assets and both of them are inactive. The plaintiff did not rebut these allegations either. It is also not disputed that the plaintiff is now a bankrupt. In the above circumstances, I am of the view that the defendant's apprehension over the plaintiff's ability to meet any order as to costs that may be made by the court is not without basis. However, the plaintiff's impecuniosity by itself is not a sufficient ground for me to make the order for security for costs. As said by the Bingham LJ in *Thune & Anor v London Properties Ltd & Ors* [1990] 1 All ER 972 at p 979; [1990] 1 WLR 562 at pp 571-572:

D In approaching that question it cannot be too emphatically stated that impecuniosity of a personal plaintiff is never of itself enough to confer on the court a discretion to order security. It is not a ground in O 23 r 1(1) ... But I am for my part firmly of the opinion that it is a matter which the court may, and in a proper case should, consider in exercising a discretion where power to make an order is established.

E I shall now turn to other matters that I consider are relevant for my consideration. Counsel for the plaintiff laid much emphasis on the fact that the plaintiff is a resident of Singapore, which is listed in the first schedule of the Reciprocal Enforcement of Judgments Act 1958. And, coupled with that, in view of the close proximity of our two countries, he contended, the enforcement of judgment is relatively easy. I agree with the learned counsel that ease of enforcement is a factor which should properly be taken into consideration. The learned counsel referred me to the case of *Coldham v Raub Australian Gold Mining Co Ltd* [1940] MLJ 50 where the application for security for costs was refused by Poyser CJ on the ground that an FMS judgment could quickly be enforced in Singapore.

G The learned Chief Justice in his judgment stated [at p 53]:

H I would not hold as a matter of law that security for costs cannot be ordered against a plaintiff resident in any British territory where provision exists for the reciprocal enforcement of judgments with the Federated Malay States; but there is all the difference between enforcing an FMS judgment in the Colony and enforcing one in, say, Uganda. We have very close legal relations with the Colony, an FMS judgment could be quickly enforced there, and in regard to plaintiffs resident there, I would follow the decision in *Raeburn v Andrews* (1874) LR 9 QB 118.

I However, in *Ng Hui Lip & Anor v Chan Hwa Cheng & Ors* [1958] MLJ 57, Smith J took a somewhat different view, there he held that the enforcement of a Federation judgment in Singapore was not automatic and therefore, the mere fact that a plaintiff was resident in Singapore was not a ground for the court refusing to order security for costs under s 369 of the Civil Procedure Code. The court, in *Ng Hui Lip's* case, granted the defendant's application for security for costs. With respect, I agree with the view expressed by Smith J therein.

In this case, even though the plaintiff is resident in Singapore but until the date of hearing of this application, the plaintiff had not disclosed her Singapore address and nor had she offered any explanation for not doing so. This, in my opinion, is a point which should weigh against the plaintiff. Next, I have been asked to consider the merits of the case. In evaluating the merits, the court is always careful to avoid any attempt at a detailed investigation into the merits of the case. As stated by Sir Nicolas Browne-Wilkinson VC in *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074 at p 1077; [1987] 1 WLR 420 at p 423:

This is the second occasion recently on which I have had a major hearing on security for costs and in which the parties have sought to investigate in considerable detail the likelihood or otherwise of success in the action. I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time.

Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself, I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure.

In the Singapore case of *Amar Hoseen Mohammed Revai v Singapore Airlines Ltd* [1995] 1 SLR 77, which was brought to my attention by the learned counsel for the plaintiff, the learned Judicial Commissioner considered at length the merits of the case and came to his finding that there was a strong possibility of the plaintiff succeeding. On that premise, the learned Judicial Commissioner disallowed the defendant's application. I am of the view that the court should only embark into the investigation upon the merits in plain and obvious cases and not in cases where the issues involved are complex, as I find in this case. On the face of the pleadings and the affidavits before the court, I am of the view that the final outcome of this case is far from clear. Therefore, in the final analysis, the question of merits is not really crucial to the ultimate outcome of this application.

Conclusion

Having regard to all the circumstances obtaining in this case, which I have considered above, I am satisfied that this application should properly be allowed. I, therefore, order that the plaintiff pay into court the sum of RM15,000 towards security for costs before the next hearing date. Costs of this application shall be costs in the cause.

Application allowed.